JD(SF)-44-03
Valley View, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ALAN RITCHEY, INC.

and

Case 28-CA-18282
28-CA-18351
28-CA-18381

DAVID LaVALLEY, An Individual

and

ALAN RITCHEY DRIVERS EMPLOYED UNDER USPS CONTRACT HCR 75120, 38121 (RELAYING FROM FLAGSTAFF, ARIZONA)

Sandra L. Lyons, Esq., Phoenix, AZ,
for the General Counsel
Dawn C. Valdivia, Esq., and
Kevin Duddlesten, Esq., of Snell & Wilmer,
Phoenix, AZ., for the Respondent

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Phoenix, Arizona on April 1 and 2, 2003. The charge in Case 28-CA-18282 was filed by David LaValley, an Individual, on November 5, 2002. Thereafter, LaValley filed the additional captioned charges. On January 30, 2003, the Regional Director for Region 28 of the National Labor Relations Board (Board) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing alleging violations by Alan Ritchey, Inc. (Respondent) of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel), and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a Texas corporation with an office and principal place of business in Valley View, Texas, and a truck transfer point located at the Little America Truck Stop in Flagstaff, Arizona. The Respondent is engaged in the business of transportation of mail for the United States Postal Service throughout the United States. It is admitted and I find that the Respondent is, and at al material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The parties stipulated, and I find, that the Alan Ritchie Mail Transportation Drivers Mutual Cooperation Association (Union or Association) is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(3) of the Act by discharging employee David LaValley; and whether the Respondent has violated Section 8(a)(5) of the Act by refusing to negotiate with LaValley for a new collective bargaining agreement, by refusing to process LaValley's discharge grievance, and by refusing to provide LaValley with certain requested information concerning his grievance.

A. Facts; Analysis and Conclusions

David LaValley was employed by the Respondent as a truck driver for eight years. He was discharged in September, 2002. [1] In 2000, LaValley was one of the drivers actively involved in forming a group, the Alan Ritchie Mail Transportation Drivers Mutual Cooperation Association to negotiate with the Respondent. The drivers as the driver's representative selected LaValley. LaValley and the Respondent's Operations Manger, Billy Williams, negotiated the agreement, and the parties entered into a contract, called the Mutual Cooperative Agreement, extending from January 30, 2001 "for a period of twenty-eight (28) months from its effective dated." Thus, the agreement would have expired on May 30, 2003. LaValley signed the agreement on behalf of the drivers as "Driver-Selected Representative."

The Association is a loose-knit, informal group. It has no officers, no constitution or by-laws, no dues structure, and no regular meetings. Although the contract contained a grievance procedure, no grievances had been filed until LaValley's discharge, *infra.*

LaValley's immediate supervisor, Don Ash, a friend of some 15 years, was also frequently LaValley's driving partner on long distance team runs. Ash is both a driver and a supervisor. As a driver he is paid the same as the other drivers under the contract. As a supervisor, he hires drivers and resolves disagreements.

[1] All dates or time periods herein are within 2002 unless otherwise indicated.

LaValley, an excellent driver, had always had a problem with abusive language and excessive use of profanity and sometimes exhibited a rather volatile temper. He had been warned about this behavior. Ash testified that he had given LaValley many informal-type friendly warnings about his behavior and told him that some day his mouth would get him in trouble. Operations Manger Williams had instructed Ash to verbally have a talk with LaValley and to try to settle him down on "more than one" occasion, and Ash had done so. LaValley's typical response would be that "he didn't give a damn, he was going to say what he wanted to say, the way he wanted to say it." [2]

In September, LaValley was involved in two such incidents that occurred only several days apart. The first incident involved a reprimand from a supervisor, Eddie Goins, for allegedly failing to remove certain personal belongings from a truck prior to its use by the next driver. Upon receiving this message from Goins, LaValley called Goins and left the following voice mail in a belligerent tone of voice:

> This message is to Eddie Goins. This is Dave LaValley. Ron and I have made an agreement. He doesn't –it is okay to leave my stuff in the goddamn truck, so let's get this stuff straight, Eddie. This isn't your damn business. We have—Ron and I—Ron takes the truck from me, he says leave the stuff in there, it is okay, and so that's what I do. You got it? Keep out of my business.

LaValley would have received only a verbal reprimand for this conduct.[3] However, within a few days LaValley appeared at a medical clinic to take his annual driver's physical pursuant to the terms of his employment and Department of Transportation regulations. Personnel from the clinic phoned the Respondent to complain about LaValley's conduct, and the Respondent's safety committee, comprised of three individuals, investigated the matter. The safety committee consists of Operations Manager Williams, Safety Director Tom Riddle, and Human Resources Director Debra Norwood.

A memorandum prepared by Riddle recounts a September 18 phone conversation with Becky, one of the personnel in the clinic. When LaValley was told that he would have to pay an additional $15 for a state form to be filled out and submitted,

> [LaValley] cursed loudly and swore at [Becky] and Patricia. She said he shook his finger at them and was very loud and intimidating. She said he called them names. She said they asked him to leave but he just went on and on till they threatened to call the police. She said that they do not want him back in the clinic.

[2] In fact, LaValley testified that he believed he had a first amendment right to use any language he pleased, as this was a matter of his constitutional freedom of speech.

[3] Williams, whom I credit, testified that he phoned Ash and instructed him to verbally reprimand LaValley about his insubordinate behavior to a supervisor, and to tell him the Respondent would not tolerate that type of conduct.

And the September 19 statement from the other individual involved in the incident, Patricia, is as follows:

> Patricia tried to explain [the reason for the additional $15 fee for filling out the state form]…that LaValley got upset and started swearing in the hall and it escalated through the clinic al the way to the front office and waiting room where everyone in the clinic could hear him. She said he went on and on about doctors in general using language that made the very uncomfortable. She asked him not to come back. She asked Candice to call the police while he was yelling. She said she started to and LaValley left then he came back in again and she told her to call the police again. She said it was one of two of the worst situations in the 15 years she had worked there. She said she did not know how she could have done better and that she wanted to help him. She said that he called her a broad and was intimidating. She said that [he] was yelling "Piss on all the doctors just piss on them all." She said there was no point in trying to reach him, he just would not listen.

As a result the safety committee, without asking for LaValley's position, determined that he should be discharged. LaValley, during the course of his testimony, did not deny creating the disturbance or using profanity. However, he explained that his conduct was the result of a number of things that irritated him, namely, that the clinic personnel required him to wait in the waiting room and took other patients ahead of him, and required him to pay for a form that should have been furnished free of charge; further, he did not like having to take a physical in the first place and was consumed by anxiety as he had an intense disrespect for doctors in general because a doctor had allegedly engaged in malpractice that directly caused his wife's death not long before.

After the safety committee made its decision, Williams phoned Ash and instructed him to discharge LaValley. Ash suggested a possible suspension instead, and was told that the decision had already been made.

As noted above, the agreement between the Association and the Respondent was effective by its terms until May 2003. However, in October, Williams learned that a new agreement would have to be completed by January 30, 2003, as this was the deadline set by the United Stated Postal Service for the completion of new collective bargain agreements. If there was no new contract in place by that date, then the wage scale of the old contract would have to remain in effect for a year or two until a new open period, and this would impact the employees to their detriment.

Williams gave no official notification to LaValley about this situation, as it was William's belief that LaValley could not be a representative of the employees for purposes of negotiations since LaValley was no longer an employee. However, Williams let it be known generally that a new agreement had to be reached by January 30, 2003 to avoid adverse repercussions to the employees. Upon learning of this, LaValley, who was intending to appeal his dismissal through the contractual grievance procedure, assumed that he would be the Association's negotiator, and began contacting employees to obtain their input for a successor agreement. This caused certain employees to voice some concern, as they were not comfortable with the dynamics of having a discharged employee as their spokesperson, and believed that this could adversely affect the negotiation process.

Ash testified that after LaValley's termination he talked with a number of employees who expressed their preference to have someone else represent them in bargaining negotiations.

Martin Aldrich testified that he had conversations with three or four drivers who expressed such concerns about LaValley, and that he also had such reservations.[4] He decided to volunteer to become the spokesperson for the employees. Thereupon, he called each driver and left a message on their voice mail stating that it appeared someone other than LaValley should be the negotiator, and that he would volunteer if no one else wanted to. He received some positive feedback from some of the drivers and no negative feedback. Thereupon, he set up two meetings with the drivers "to get going on this contract…and get a forum or discussion going about it. " However, according to Aldrich's testimony, LaValley attended the meetings and began conducting them as if the meetings were his idea, and solicited the drivers who attended the meetings to sign a petition authorizing him to conduct negotiations.

Ed Bender, a driver, testified that he personally told LaValley that "I didn't think it was appropriate that he represent us in that capacity [since]…he was no longer employed by Alan Ritchey." Bender testified that most drivers felt the same way. On December 9, Bender prepared a memorandum to the drivers entitled "Negotiation Process and Organization," and sent it to all the drivers as well as to Williams. The memorandum states:

> First of all let me say that I really have nothing personally to gain by this memo in that I will be retiring in a few months, after over twelve years with the company. I would like to see better organization which may, in the future, avoid the problem we are going through now in the negotiation process—who will represent us as the "bargaining table."
>
> 1. I think the Flagstaff drivers should have some type of formal organization – "Flagstaff Drivers Association" for lack of a better name. It would include a communication procedure and a method to resolve Flagstaff problems with the company, and others, and a means to designate representatives for various concerns which now involves our rep for negotiation for our new contract. I wish Don Ash could be involved but he can't in that is a part of Anal Ritchey Management being our "boss" here in Flagstaff.
>
> 2. I personally have a problem with Dave LaValley representing us in the negotiation process because of his current status. He represented us well in our previous negotiations and has some good ideas. But he is no longer employed by Alan Ritchey and by virtue of him being at the negotiating table (in his current status) may leave a sour taste with whomever we negotiate with on behalf of Alan Ritchey. This "sour taste" could result in our requests not being considered appropriately. Dave may be re-employed, evidently he has a strong case, but currently he is not. I personally wish him well in this regard.

[4] At the outset of the hearing Martin Aldrich claimed that he, not LaValley, represented the employees in this proceeding.

> As of today, at 10:30 a.m. eight (8) drivers out of twenty (20) have signed the request by Dave to be our designated negotiations representative. Whether the other twelve (12) do not want Dave for our rep or they haven't had the time to sign I don't know. But time is of the essence and we are late now in "getting our act together" in coming up with our negotiation concerns.
>
> As of this writing I am awaiting a call from Billy Williams as to what the time line is. Possibly this problem can be resolved in our meetings this Wednesday and Thursday, 7:00 pm, At the Little America Coffee Shop. If you are unable to be at either of these meetings please pass on your thoughts with someone else or leave them in writing. We need your ideas and concerns.

Williams testified that he understood there was concern among the employees about the status of LaValley, and to clarify the situation he instructed Ash, apparently on December 13, to disseminate the following memorandum and to advise him of the results:

> Dear Employees:
>
> It has recently come to our attention that many of you do not wish to have Dave LaValley as your bargaining representative because he is no longer employed by Alan Ritchey. Please indicate on this letter if this is correct or not. It is important that we know who your bargaining representative is so that we may communicate with and negotiate with that person pursuant to the mutual cooperation agreement. Once you have signed the appropriate area, return the letter to Don Ash. Thank you for your time in this important matter.
>
> * * *
>
> I <u>want</u> Dave LaValley as my bargaining representative.
>
> _____
> employee signature
>
> I <u>do not want</u> Dave LaValley as my bargaining representative.
>
> _____
> employee signature

The drivers returned the forms to Ash, who in turn forwarded them to Williams. Eight drivers selected LaValley, and 15 drivers voted that they did not want LaValley as their bargaining representative. Apparently, LaValley continued to maintain that he was the representative. Williams advised LaValley by letter dated January 3, 2003, as follows:

> This letter is in response to your voice messages over the past weeks. A majority of ARI employees have indicated that they no longer want you to represent them as their bargaining representative; they have chose other representatives. Based upon this information, I will not be scheduling any upcoming negotiation sessions with you. These sessions will be held with the newly selected employee representative(s). If the employees indicate to me otherwise, I will contact you. [5]

Aldrich advised Williams that he was the driver's representative. Aldrich and Williams negotiated a new two-year agreement effective from January 29, 2003 until January 29, 2005. There is no indication that any of the Respondent's current drivers have objected to Aldrich as their representative or to the terms of the collective bargaining agreement.[6]

The General Counsel maintains that the Respondent seized upon LaValley's conduct as a pretext for discharge in order to prevent LaValley from continuing as the employees' bargaining representative. Thus, LaValley testified that he often complained to Ash, during their trips together, about one aspect of the contract that he believed to be unfair to the employees, namely the Qualcom system. The Qualcom system is a satellite tracking system installed on each truck that enables the Respondent to determine, in addition to the location of the truck, precisely how many hours and minutes each truck is being operated, and therefore the amount of driving time between stops; this is determinative of the wages to be paid for each trip. I credit Ash, who favorably impressed me as a very candid witness, and find that although this was sometimes a topic of conversation with LaValley as he was also concerned about wages, he did not advise Williams that LaValley was concerned about this or intended to make an issue of it during future negotiations. Moreover, at the time of LaValley's discharge, the current contract was to continue for some eight months.

LaValley's conduct was clearly inappropriate. He had been warned many time about his inability to control his language and temper. There is no showing that Williams harbored animus against LaValley or was concerned that LaValley's position as negotiator would somehow be detrimental to the Respondent's interests during future negotiations.[7] Moreover, I credit Williams and Riddle and find that LaValley's status as negotiator had nothing to do with the decision of the safety committee to discharge him. I shall dismiss this allegation of the complaint.

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[5] In fact, the aforementioned petition LaValley had circulated among the employees between December 7 and 14 contains the signatures of 17 drivers who indicated that they wanted LaValley to represent them in negotiations for the new contract. For some unknown reason, LaValley did not rely upon this petition or present it to either the Respondent or the other employees.

[6] During the course of negotiations, LaValley conferred regularly with Aldrich, who asked for LaValley's input; thus, LaValley did in fact assist Aldrich with contract proposals and other contract matters.

[7] I do not credit LaValley's testimony that Ash told him a particular applicant had not been hired by Williams because Williams believed he was a union advocate. I credit Ash's denial that he made such a statement.

The General Counsel maintains that the Respondent was obligated to bargain with LaValley unless it had a good faith doubt that a majority of unit employees no longer wanted LaValley to act as their negotiator. However, the General Counsel has cited no cases for this proposition. The cases cited by the General Counsel are inapposite as they involve *Struckness*[8] polls to determine whether the employees desire to continue being represented by a particular labor organization. Here the Respondent was not attempting to withdraw recognition.

It is clear that the Respondent, receiving conflicting information, was attempting to discern whether the drivers wanted LaValley to negotiate the successor contract. In the typical situation this is not a problem as the union designates the negotiator and the employer must comply. However, here it seems the Association abdicated its responsibility and left it to the machinations of individual employees to determine whether LaValley or some other individual would be authorized to do the negotiating. This presented the Respondent with a dilemma. Under the circumstances, I find that the Respondent's poll was non-coercive: time was of the essence; the drivers were clearly involved in an intra-union dispute; the poll was conducted for a legitimate reason; it was factual and the Respondent did not indicate a preference for one negotiator over another; all the drivers were aware of the surrounding circumstances; there was no anti-union animus by the Respondent; and there were no contemporaneous unfair labor practices that would cause the Respondent's motives to be suspect. Under the circumstances, the poll was simply tantamount to a letter to each member of the Association asking the group, collectively, to designate a negotiator for a successor agreement.[9] This is something the Association should have done on its own volition. [10] The Respondent, for the benefit of the drivers, was anxious to begin negotiations; and it simply and legitimately wanted to know with whom to negotiate. I shall dismiss this allegation of the complaint.

Following his discharge on September 20, LaValley timely filed a grievance under step one of the contractual grievance procedure. This was the first grievance ever filed under the contract. His step one grievance was denied. The Respondent maintains that LaValley did not timely file his step two appeal. The step 2 appeal was required to be filed by October 4. The General Counsel claims that in fact LaValley did timely file the step 2 appeal. Thus, on September 27, LaValley sent a fifteen-page fax to the Respondent. However, the first page states as follows:

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[8] *Strucksnes Construction Co.,* 165 NLRB 1062 (1967).

[9] Indeed, it remains unclear who represents the Association in this proceeding. As there are no officers of the Association, it would appear that any particular driver has equal authority. The petition signed by a majority of employees simply authorizes LaValley to "represent me on the Mutual Cooperative Agreement negotiations for the 2003-2004 Contract with Alan Ritchey Inc." It does not give LaValley the authority to file charges or speak for the Association regarding any other matters. Similarly, it appears that Aldrich's authority only encompasses his negotiating capacity. It is likely that the remedy proposed by the General Counsel and LaValley, namely that certain portions of the contract should be renegotiated by LaValley, is detrimental to the interests of the drivers. Insofar as the record shows, only LaValley, a non-employee, is not happy with the contract negotiated by Aldrich.

[10] Bender's analysis of the situation in the December 9 memorandum he sent to each employee was entirely correct: the Association should develop a "communication procedure and a method to resolve Flagstaff problems with the company, and others, and a means to designate representatives for various concerns which now involves our rep for negotiation for our new contract."

> To: Ken Brown
> This is where I am forced to to (sic) go
> for my illegal discharge. My 1st Amendment
> rights have been violated by the company,
> Which (sic) holds a government contract and
> can not discriminate under the A.D.A. Act,
> Or (sic) violate my Constitutional Rights.

The Respondent employs no person by the name of Ken Brown. In fact, LaValley testified that he was intending to send the fax to Craig Brown, the Respondent's attorney. Pages 2 through 8 of the fax are missing from the exhibit. Neither LaValley, nor the General Counsel, nor the Respondent can account for the missing pages and there is no reliable record evidence concerning their substance. Pages 9 through 12 contain news bulletins from the American Civil Liberties Union regarding free speech matters. Pages 13 and 14 contain information about the Americans with Disabilities Act. Page 15 is as follows:

> To: Billy Williams
>
> if (sic) this illegal discharge is going to continue please start the final step, arbitration.
>
> Thank you
> Dave LaValley
>
> cc: ACLU PHX Office

Williams testified that he did not know what to make of this fax and did not know that the fax was for the Respondent's attorney. He did not consider it to be a request for the step 2 appeal, as it says nothing about a step 2 appeal; rather, it speaks of arbitration. He noticed that page 15 was copied to "ACLU PHX Office" and surmised that LaValley was attempting to resolve the matter through the ACLU.

On October 3, still within the time limitation for the step 2 appeal, LaValley sent identical letters by certified mail to each member of the Safety Committee, as follows:

> I respectfully request you to reply in written form within 7 days of receipt of this letter why you discharged me from my employment with Alan Ritchie Inc. Please include all information that you considered in your decision, including all persons and entities you had contact with in this matter.

LaValley testified that he considered this letter to constitute the step two appeal that would commence the step 2 process.[11] Williams testified that he regarded the letter only as a request for information, as it says nothing about a step 2 appeal. Williams furnished LaValley with certain information.

In a fax to Williams dated October 9, LaValley states that:

[11] He did not testify that he considered the September 27, 15 page fax, to constitute the step 2 appeal.

> I sent the letters requesting the information on my discharge to you, Debra Norwood, and Dan Riddle. Will you please advise me when I will have my replies and when we can set the time for the second step of the appeal process?

Williams replied by letter dated October 14, advising, *inter alia*, as follows:

> When I received your request to move to Step II proceedings of the appeal process, I noticed your request was not made within the five days mandated in the Mutual Cooperative Agreement. Since the appeal process has concluded, there should be no reason for you to wait in filing your complaint with the ACLU.

Thereafter, LaValley requested certain additional information regarding his dismissal, and the Respondent has taken the position that since the matter is closed it has no obligation to furnish the information.

I shall dismiss the complaint allegation that the Respondent has failed and refused to process LaValley's discharge grievance for discriminatory reasons. As found above, the discharge of LaValley was not discriminatorily motivated. Moreover, the Respondent, as shown by the exchange of documents set forth above, had legitimate reasons for concluding that LaValley had not timely filled a step 2 grievance. Therefore, I find that the Respondent's refusal to continue with the grievance process was not discriminatorily motivated. Finally, because the appeal process had been concluded, I find the Respondent was under no continuing duty to furnish further information to LaValley regarding his termination.

The complaint alleges that the Respondent unilaterally, without bargaining with the Association, modified the hours of work and the manner of computing wages by instituting the Qualcom system. The record evidence shows that during the negotiation of the first contract in 2001 this matter was discussed between Williams and LaValley. Thus Williams testified:

> Whenever we negotiated our first contract, Dave LaValley and I, we sat down, we discussed Qualcom, and we adjusted those routes to where we could get them just as close as we could to the time it actually takes to get from Flagstaff to Wasco.

Williams testified that at that time, even though the Qualcom system had not yet become operative, the Flagstaff drivers were concerned that Qualcom would result in a pay reduction, and that this was discussed. Williams testified that it was going to be a few months before Qualcom was turned on, and he advised LaValley during negotiations:

> I said, "Dave, we need to make sure that we get this schedule accurate so that it doesn't hurt the drivers whenever we flip the switch and start paying them off Qualcom."

I credit Williams, and find that the Qualcom matter had in fact been negotiated. Moreover, the management rights provision of the collective bargaining agreement specifically permits the Respondent to "introduce new equipment, technologies and supplies" and "to introduce technological change to existing services, techniques or equipment"; and the wages and benefits section of the agreement states that, "The hours to be paid to each Driver per run will continue to be set by the Company." I shall dismiss this allegation of the complaint.

Accordingly, I shall dismiss the complaint in its entirety.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended:

ORDER[12]

The complaint is dismissed in its entirety**.**

Date: July 3, 2003

Gerald A. Wacknov
Administrative Law Judge

[12] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.